

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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No. 08 Civ 4336 (WCC)

GREGORY WESTHOFF,

Plaintiff,

**AFFIRMATION IN OPPOSITION  
TO CROSS MOTIONS FOR A  
DISMISSAL ORDER PURSUANT  
TO RULE 13(A), ENJOINING  
FURTHER CLAIMS AND AN  
ORDER PURUANT TO RULE 21**

STEFANI MIOTTO and KELLY GREEHAN,

Defendants.

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Clement S. Patti, Jr. an attorney duly admitted to practice law in the State of New York ,  
affirms the following under penalty of perjury.

1. This Affirmation is submitted in opposition to defendant Stefani Miotto's Cross-Motions seeking an Order a) dismissing the Complaint against Miotto pursuant to Rule 13(a) of the FRCP; (b) enjoining Westhoff for bringing or continuing any claim in any other Court; and (c) an Order pursuant to Rule 21 severing the claim of Westhoff against defendant Greehan. This Affirmation is based upon direct knowledge and information and belief, the sources of which are the files of the matter maintained by my office. The relief sought by defendant Miotto should be denied as it lacks basis in law and fact.

2. Defendant Miotto's motion completely disregards the provisions of 28 USC §1441(b) which essentially provides the plaintiff with choice of forum in conformity with the U.S. Constitution and recognition of the sovereignty of the states. Severing defendant Greehan from the Westhoff v. Miotto and Greehan matter does not negate the provisions of the aforementioned statute.

3. Defendant Miotto's Memorandum of Law characterizes Westhoff's causes of action as mandatory "counterclaims." This is a mischaracterization and nothing more than the Defendant's attempt to label the claim as a counterclaim so as to invoke FRCP Rule 13. The claims alleged in the Complaint originally filed in State Supreme Court do not "arise out of the transaction or occurrence that is the subject matter of the opposing party's claim." The Miotto v. Westhoff et al. case alleges various acts by Westhoff against Miotto culminating in a complaint to the Yonkers Public Schools in May, 2006. The Westhoff v. Miotto and Greehan case originally a case filed in the State Supreme Court involves claims which arose predominantly out of the false prosecution perpetuated by Miotto.

To be sure, as set forth in Rule 13(a), a pleading shall state as a counterclaim a claim "which at the time of the serving of the pleading the pleader has against any opposing party." (Emphasis added). Indeed, the Miotto v. Westhoff, et al. case was filed on or about February 14, 2007, while the acquittal of Westhoff, giving rise to the Westhoff v. Miotto and Greehan case did not occur until March 6, 2008.

WHEREFORE, it is respectfully requested that the Court dismiss the Cross-Motions and for such other and further relief as this Court deems just and proper.

Dated: White Plains, New York  
June 12, 2008

/s/ \_\_\_\_\_  
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